

**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
**APPEALS BOARD**

In the Matter of the Appeal of:

MELMARC PRODUCTS  
4040 West Carriage Drive  
Santa Ana, CA 92704  
Employer

Docket No. 09-R3D1-2878

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to the authority vested in it by the California Labor Code, and having taken this matter under reconsideration on its own motion, now issues this decision after reconsideration.

**JURISDICTION**

The Division of Occupational Safety and Health (the Division) issued a citation to Melmarc Products, Inc. (Employer) alleging a violation of section 342(a) [failure to timely report a serious injury to the Division] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.<sup>1</sup> The Division proposed a \$5,000 civil penalty. Employer timely appealed the citation.

On January 13, 2010, an Administrative Law Judge for the Board issued an Order assessing a penalty of \$4,000 based, in part, on the parties' stipulations regarding the serious injury and Employer's response thereto. The Board took this matter under reconsideration on its own motion on February 9, 2010 to determine whether an appropriate penalty was assessed. The Division filed an answer to the Board's Order of Reconsideration on March 8, 2010.

**ISSUE**

Whether the penalty assessed was appropriate under the circumstances?

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<sup>1</sup> Unless otherwise specified all section references are to Title 8, California Code of Regulations.

**FINDINGS AND REASONS  
FOR  
DECISION AFTER RECONSIDERATION**

The ALJ considered two appeals on the same day from alleged section 342(a) violations involving Employer.<sup>2</sup> The two violations occurred approximately six months apart. In the earlier instance, Employer failed to report the injury and had no reporting system in place. In the second situation, Employer became aware of the need to report a serious injury on Friday, July 10, 2009 and reported it on Monday July 13, 2009. The delay occurred because the employee charged with reporting serious injuries to the Division left work early that Friday due to complications associated with a high- risk pregnancy.

Despite profound differences in Employer's response to the serious injury reporting requirements in the first and second instances, the ALJ assessed penalties of \$4,500 and \$4,000, respectively for the two violations. In *Trader Dan's dba Rooms N' Covers, Etc.*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009), we expounded on the difference between situations in which employers fail to report and those in which employers report late. We found a "*great distinction* between situations in which legitimate circumstances contribute to a late report by an employer and situations in which an employer never reports." (*Id.*; emphasis added.) We clarified that the offense is greater where no report is made and affirmed that the penalty must be proportional to the offense. (*Id.*) We further held that factors found to mitigate against imposition of the full \$5,000 proposed penalty must be given less weight in a no-report situation than they might be given in a late report context. (*Id.*) Here, we conclude that the \$500 lower penalty afforded Employer for the late report, compared to the penalty assessed for the no-report violation, fails to capture "the great distinction" of which we spoke.

Given the mitigating factors addressed in the parties' stipulations for the second violation, and the Board's precedential decisions regarding section 342(a) penalty assessments, we conclude that a lower penalty is warranted in this case and assess a civil penalty of \$2,000. This penalty considers the significant improvement Employer made toward complying with section 342(a) following the first violation, the substantial, legitimate factors that contributed to the late report, and the short delay in reporting, while also recognizing the need for further improvement to be made to Employer's reporting system. For example, as the Division contends in its answer to Employer's petition, Employer may need to institute redundancies in its reporting procedures to address situations in which the primary reporter is unexpectedly absent.

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<sup>2</sup> The Board did not take reconsideration of the Order pertaining to the first violation, docket no. 09-R3D1-1702.

### **DECISION AFTER RECONSIDERATION**

The \$4,000 penalty assessed for the section 342(a) violation is vacated.  
A civil penalty of \$2,000 is assessed.

CANDICE A. TRAEGER, Chairwoman  
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: MAY 12, 2010